

House Bill 309
January 27, 2011
Presented by Bob Lane
House Agriculture Committee

Mr. Chairman and committee members, I am Bob Lane, Chief Legal Counsel for the Montana Department of Fish, Wildlife & Parks (FWP). I am here in opposition of House Bill 309.

HB309 almost completely repeals the public's right to recreate on rivers and streams: by making any stream or river a private stream or river where the return flows from irrigation are the majority of the flow; and, by privatizing side-channels of braided rivers and streams. All of this in the guise of clarifying the present, clear statutory definition of private ditches that are off-limits to public recreation.

The repeal is accomplished in two ways. The most comprehensive, and partially hidden but intended effect of HB309, is that return flows would count as diverted water when determining whether diverted water is the principle source of water in a stream or river pursuant to new subsection (2)(c)(ii) of MCA 23-2-302. This makes no sense. For example, the water diverted from the Bitterroot River during an irrigation season is three times the actual flow in the river. Where there is highly developed irrigation, water is diverted again and again with most of the water returning. Therefore, HB309 as written, defines the Bitterroot River as a ditch where recreation is prohibited. In fact almost all rivers and streams in Montana, except those in wilderness areas and the headwaters of streams on Forest Service land, could no longer be used by the public. HB309 not only doesn't work, it just doesn't make any sense.

Also, picture a braided stream or river that has at some point along its course a ditch with a headgate attached to this side-channel. A person can then capture and privatize this branch of the river or stream by constructing some sort of structure at the head of the braid. Under HB309, the braid of the river or stream is now a ditch because the water is diverted from a natural water body and is at times eventually used for irrigation through a real ditch or used by watering livestock. The irony is that the new, artificially defined ditch was a natural stream or river, just prior to the control structure. The control structure is defined as diverting water even though the water would be flowing in the braid or side-channel anyway.

FWP recognizes the rights of landowners to not have their property rights burdened by the public attempting to recreate in irrigation ditches. The stream access statute does precisely this and there is no need to clarify its precise language. The stream access statute defines a ditch as a constructed water conveyance system that is used to divert water for a beneficial use. This is a simple, clear, and effective protection for landowner irrigators. Look at §23-2-201(6) and §23-2-302(1) (c), MCA.

The proposed definition in HB309 does not work to protect landowners. It is confusing, complicated, and contradictory. It privatizes whole streams and rivers and privatizes braids or side-channels without providing the clear protection for landowners of their irrigation ditches that the Stream Access Law now provides.

This bill is simply an attempt to overturn the seminal decision of the Montana Supreme Court in the Mitchell Slough case. The facts of that case tell the whole story.

Mitchell Slough was identified in an 1872 General Land Office survey and map as the "Right Fork of the St. Mary's fork of the Bitterroot River". In 1871 an irrigation ditch, called the Etna Ditch, was constructed to take water from the Bitterroot River through its headgate on Mitchell Slough. The headgate and ditch have remained in the same place for 140 years while Mitchell Slough has been altered to make sure this side-channel remained connected to the irrigation ditch, so the Etna Ditch would not need to be rebuilt. It is more practical to alter a stream than build a new ditch. The construction ultimately included moving the connection of this side-channel to the Bitterroot River and a headgate to control flow into Mitchell Slough, limiting high-water and enhancing low-water flows. The Montana Supreme Court held that this side-channel, although altered for the use and convenience of irrigators, remains a part of the Bitterroot River. Mitchell Slough has always been a braid or side-channel of the Bitterroot River. It is not and was never a ditch. HB309 is an attempt to reverse this common sense decision.

Finally HB309 claims it amends in the limitation on recreation use determined by the Montana Supreme Court decision in the *Galt* case in 1987. The amended changes are more wrong than right. Big game hunting was held to exceed the scope of the public right to recreate. Therefore, this part can be repealed. However, camping is allowed if it is necessary for the recreational use of a river and only permanent duck blinds and boat moorages, as contracted with seasonal boat moorages and duck blinds were struck down. Amendments based on the *Galt* decision must be carefully faithful to the decision. HB309 is not.

For the above reasons, FWP opposes HB309.